

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 29, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0687-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WALTER B. COWAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: GEORGE A. W. NORTHRUP, Judge. *Affirmed.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Walter Cowan appeals from a judgment convicting him of selling cocaine, party to a crime. He also appeals from an order denying postconviction relief. His postconviction motion alleged ineffective assistance of counsel. The trial court denied his motion without a hearing because the motion failed to specifically identify counsel's alleged omissions. The issue is whether the trial court should have held a hearing on

the motion despite its deficiencies. Because we conclude that the trial court acted properly, we affirm.

A postconviction motion alleging ineffective assistance of trial counsel "must contain at least enough facts to lead the trial court to conclude that an evidentiary hearing is necessary. Otherwise, the hearing as required by *Machner* [*State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979)], simply does not come into play." *State v. Washington*, 176 Wis.2d 205, 216, 500 N.W.2d 331, 336 (Ct. App. 1993). Here, Cowan's motion identified trial counsel's omissions as failure to object to inadmissible hearsay at trial and at sentencing. However, the motion did not identify the hearsay in question. It therefore contained nothing more than conclusory allegations and, as such, was legally insufficient. *Id.* at 214, 500 N.W.2d at 335.

On appeal, Cowan provides the missing facts. Ethel McShan-Goins testified without proper objection that she obtained cocaine from a man unknown to her, but identified by someone else present as "Double D." A police officer was then allowed to testify that McShan-Goins gave him a prior consistent statement containing the "Double D" information. Another police officer then testified that Cowan's nickname was, in fact, "Double D" or "D."

Even if this testimony included inadmissible hearsay, and even if Cowan received a hearing on the merits of the issue, he had no reasonable chance of success on his motion. Both McShan-Goins and the arresting officer identified Cowan in court as the man who sold them cocaine on the night in question. It was that testimony, and not Cowan's nickname, that resulted in his conviction. There is no ineffective assistance of counsel if, as here, there is no possibility of a different result on retrial. See *State v. Wirts*, 176 Wis.2d 174, 183, 500 N.W.2d 317, 319 (Ct. App.), *cert. denied*, 114 S. Ct. 257 (1993). We may reach that result, without remand for a hearing, because whether counsel's omission prejudiced the defendant is a question of law we may decide without deference to the trial court's decision. *State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985).

Counsel's other alleged omission occurred at sentencing, when she failed to object when the prosecutor stated that the Madison Police Department knew through confidential informants that Cowan was involved in other

criminal activity. Again, however, Cowan cannot succeed on the merits. A sentencing court may consider "uncorroborated hearsay that the defendant has had an opportunity to rebut." *State v. Marhal*, 172 Wis.2d 491, 503, 493 N.W.2d 758, 764 (Ct. App. 1992) (quoting *United States v. Lawrence*, 943 F.2d 868, 874 (7th Cir. 1991)). Cowan had the opportunity to rebut the hearsay and, in fact, counsel did offer a rebuttal argument. Because counsel had no basis to object, she cannot be charged with ineffectiveness.

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.